(3)

Supreme Court, U.S.
FILED
8 1997
CLERK

No. 97-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DR. HARRY POWER,

Petitioner,

vs.

RUTGERS, THE STATE UNIVERSITY and
RICHARD FOLEY, DEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

JOAN E. GOLDBERG
Counsel of Record
P.O. Box 496
One Railroad Avenue
Goshen, New York 10924
(914) 294-3222

MICHAEL H. SUSSMAN
STEPHEN BERGSTEIN
SUSSMAN, BERGSTEIN & WOTORSON
25 Main Street
Goshen, New York 10924
(914) 294-3991

30pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	
A: IN SANCTIONING POWER ON THE BASIS OF ALLEGATIONS TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND, RESPONDENTS UNLAWFULLY DEPRIVED HIM OF THREE PROTECTED PROPERTY INTERESTS	2
B: RESPONDENTS DEPRIVED PETITIONER OF DUE PROCESS BY SANCTIONING HIM ON THE BASIS OF CHARGES TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND	5
C: THE GRIEVANCE PROCEDURE DID NOT PROVIDE PETITIONER SUFFICIENT PROCESS	8
CONCLUSION	10
Appendix	
Letter, Foley to Power, dated May 16, 1997	A-1
Position Statement, National Association of Scholars	A-3

TABLE OF AUTHORITIES

Cases:	Page(s)
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	3
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	7
Perry v. Sindermann, 408 U.S. 593 (1972)	3
Stana v. School District of the City of Pittsburgh, 775 F.2d 122 (3d Cir. 1985)	3

No. 97-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DR. HARRY POWER,

Petitioner,

vs.

RUTGERS, THE STATE UNIVERSITY and
RICHARD FOLEY, DEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner, Harry Power, respectfully submits this brief in reply to respondents' brief in opposition to his certiorari petition. This procedural due process case addresses whether, on a motion for summary judgment, the Third Circuit properly held that petitioner, a tenured professor at Rutgers State University, had sufficient notice of charges that predicated his punishment. While petitioner knew that his employer had charged him with sexually harassing a female graduate student, unrelated allegations — *for which petitioner was denied notice and an opportunity to respond* — also informed the sanctions. Petitioner is hard-pressed to imagine a more blatant

violation of due process principles. As petitioner was deprived of significant property interests without proper notice or an opportunity to respond, certiorari is warranted to correct the lower courts' misapplication of this Court's well-settled principles governing procedural due process.

In their brief, respondents ramble on about petitioner's alleged sexual harassment and reiterate anonymous student complaints about his classroom style. Resp. Brief at 3-11. These arguments are completely irrelevant to the issues before this Court and serve only to obfuscate the real issues, which address procedural due process, not sexual harassment; respondents' inflammatory brief should not confuse this Court.[1]

ARGUMENT

A. IN SANCTIONING POWER ON THE BASIS OF ALLEGATIONS TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND, RESPONDENTS UNLAWFULLY DEPRIVED HIM OF THREE PROTECTED PROPERTY INTERESTS

Respondents agree that property interests may derive from mutually-explicit rules or understandings that secure benefits and support claims of entitlement to them. Resp. Brief at 17-18. While respondents assert that the record does not support petitioner's reliance on university agreements and past practices, that is simply not the case.

---

[1] Annexed hereto as Exhibit 2 is a position statement about sexual harassment and academic freedom from the National Association of Scholars. Petitioner has adopted this statement as reflecting the harm to academic freedom posed by a university's failure to properly handle sexual harassment complaints. As petitioner's sanctions include the threat of further discipline in the event respondents receive additional *complaints* — as opposed to proven charges — of sexually inappropriate behavior, they not only violate his due process rights but his academic freedom; in order to stay out of trouble, petitioner would have to modify his teaching style and content to ward off *any* complaint, no matter how baseless, since a complaint, by itself, can predicate further discipline.

As an initial matter, respondents argue that petitioner's claimed property interests are too trivial to warrant due process protection. Resp. Brief at 15, n.7. Respondents misread *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972) to argue that this Court has only recognized as property interests those employment relationships that are terminable for cause. *Id.* Respondents can cite no authority for the proposition that public employment decisions short of termination lack due process protection.

Petitioner was denied three property interests: (1) the right to be considered for promotion to the rank of full professor; (2) the right to the benefit of his successful grievance and (3) the right to all the privileges accorded faculty members generally. These property rights stem from agreements and past practices for which petitioner had "a legitimate claim of entitlement." *Perry v. Sinderman*, 408 U.S. 593, 602-03 (1972).

First, under the Collective Bargaining Agreement ("CBA") binding the parties, after a successful grievance, a remand review is structured to remedy the deficiencies identified in the flawed promotion process. By April 1993, petitioner and the provost's office had agreed upon an appropriate remand: in conjunction with the Chair of the Department of Biological Sciences, the Dean's office would "undertake . . . a thorough review of this issue and . . . prepare a formal report describing [its] conclusions with regard to the conduct alleged by several of the students in the course [(General Biology, Spring 1989)]". (Ja765). The remand process was to commence as soon as practicable and the results used during the following year's promotion review. (Ja1543).

The agreements and university practices that governed the remand process establish that petitioner reasonably understood that he was entitled to fair consideration for his promotion. *Roth*, 408 U.S. at 576-78. *See also*, *Stana v. School District of the City of Pittsburgh*, 775 F.2d 122, 126 (3d Cir. 1985)("Property interests . . . can also arise from written or unwritten state or local government policies or from mutually explicit understandings between a government employer and

employee") (citation and internal quotation marks omitted). Respondents incorrectly describe this concrete property interest as "abstract." Resp. Brief at 16.

In addition, petitioner reasonably expected a timely remand, which expectation respondents ignored when by staying the remand pending review of Eileen Maher's sexual harassment complaint. *See*, Ja618 ("If the university and the grievant reach agreement concerning the remand, it will be reduced to writing and signed by the University and the grievant. *Such remedy will be implemented promptly*") (emphasis added). As neither the CBA nor any university practice permits the exception that respondents assert (remands may be delayed because of student complaints), they do not explain why petitioner could not reasonably have viewed the delay as an infringement on his property right to a prompt remand.

Finally, respondents trivialize petitioner's claim to a property interest in faculty member privileges. Respondents characterize his interest as the right to meet with students alone or employ student assistants. Resp. Brief at 16. Respondents also argue that petitioner improperly bases his argument on respondent Foley's written comment that the sanctions should alter his behavior "so that he can return to the customary duties of a faculty member at this University." *Id.* at 18. *See also*, Letter, Respondent Foley to Bender, reprinted in Pet.App. at A-49; Letter, Respondent Foley to petitioner, dated May 16, 1994, annexed hereto at App. 1.

In fact, as a tenured professor, petitioner had the right to (1) sponsor graduate students and use them as teaching and research assistants, (2) have office hours and assist his students and (3) apply for research grants, which right the university has violated by precluding him from employing graduate students. These sanctions addressed the heart of petitioner's job responsibilities as a functioning faculty member who needs graduate students to help conduct scientific research. They also deprived petitioner of the kind of support and services necessary to effectively teach, including teaching assistants

and the need to meet privately with students. *Id.* at A-49. As respondent Foley recognized in his May 16, 1994 letters to Barbara Bender, Associate Dean of the Graduate School, and petitioner, these are a faculty member's rights to function in a customary manner. Foley's letter was intended to justify petitioner's sanctions for, *inter alia*, allegedly sexually harassing Maher. As respondent Foley expressed outrage over Maher and others' allegations about petitioner, it is clear that his desire to harshly punish petitioner led him to deny petitioner the usual benefits upon which professors reasonably enjoy and rely.

B. RESPONDENTS DEPRIVED PETITIONER OF DUE PROCESS BY SANCTIONING HIM ON THE BASIS OF CHARGES TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND

Respondents argue that petitioner has erroneously claimed that they punished him for allegations of which he never received notice. In fact, contrary to basic summary judgment principles, respondents examine the record in the light most favorable to their position and argue that petitioner had no right to answer questionable charges about his character before imposing sanctions predicated on those very allegations.

As petitioner has argued, the record establishes that respondents punished him because of Maher's complaint *and* allegations that, *inter alia*, he was a violent person and tried to grope a graduate student's breasts. The latter allegations surfaced during a meeting between respondent Foley and other administrators to discuss Maher's allegations. One day earlier, these administrators met with petitioner to discuss Maher. One University official who attended both meetings, Karen Stubaus, did not know if anyone advised petitioner that his alleged inappropriate classroom comments could affect the resolution of Maher's complaint. (Ja1354-55). In fact, no one had.

In his May 16, 1994 letter to petitioner explaining the sanctions, respondent Foley purports to cite the only evidence used to resolve the charges: Maher's complaint and

petitioner's reply. (Ja578). That letter is annexed hereto at App. 1. However, in the same letter, respondent Foley added, "I cannot overemphasize how disturbed I am *regarding what I read and heard regarding your behavior*. It is my hope that these findings will both safeguard those around you and encourage you to alter your behavior for the better." (Ja579) (emphasis added). Read in the light most favorable to petitioner's position, these statements imply that allegations beyond Maher's sexual harassment complaint — particularly, allegations respecting petitioner's deportment — informed the sanctions.

Indeed, in a separate memorandum that explains the sanctions, respondent Foley expressly cited allegations that petitioner made inappropriate classroom comments, was a violent person and tried to sexually grope a student. Respondent Foley intoned, "Obviously this situation cannot be permitted to continue." Pet.App. A-49. As well, respondent Foley's investigatory "findings" expressly invoke these additional allegations to explain the sanctions. *Id.* Like respondent Foley's letter to petitioner, his memorandum to Barbara Bender expresses concern for "the physical safety of those around Dr. Power" and references "all I have read and heard." *Id.*

Accordingly, respondents cannot persuasively argue that Foley sanctioned petitioner exclusively upon findings that he had harassed Maher, not allegations for which he lacked any notice. Both documents bear the same date, concern the same topic (petitioner's punishment) and employ similar language to express respondent Foley's purported concern for others' safety. Respondent Foley clearly allowed non-sexual harassment allegations to inform petitioners' sanctions.

The record supports the conclusion that the other sanctions bore no relationship to sexual harassment prevention and were designed to address petitioner's other alleged transgressions of which he was denied notice and an opportunity to respond.

While the university asserts that, as early as March 28, 1994, it had determined that petitioner had sexually harassed Maher and to impose discipline, that conclusion resolves

disputed fact issues. As noted, a rational factfinder may conclude that respondent Foley set forth all of petitioner's alleged offenses, sexual and otherwise, in the Bender memorandum for a reason: they informed the sanctions. Stubaus' handwritten notes from the March 28, 1994 meeting reflect that the participants only discussed Maher's complaint, not allegations about petitioner's alleged violent proclivities and other issues that respondent Foley related to Bender. (Ja586-592). *See also*, Ja586 (meeting was arranged to let petitioner further respond to Maher's charges). Respondents have proffered no evidence that they confronted petitioner with any other charges. Indeed, if respondents really determined as early as March 28, 1994 that petitioner had sexually harassed Maher, why did it invite him to submit follow-up materials in response to the allegations? (Ja537-39).

Finally, respondents argue that, even if petitioner's punishment derived from allegations other than Maher's complaint, he was informed of the substance of the evidence against him and respondent need not produce "every bit of evidence" supporting its decision. Resp. brief at 22. This position is untenable and finds no support in this Court's precedents. While *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-56 (1985) states that pre-termination notice should constitute "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," it does not follow that an employer can withhold notice of unrelated charges from the employee and then rely upon them to support his punishment. Maher's charge that petitioner sexually harassed her bore no relevance to allegations that petitioner was a violent man. The former charge did not touch upon the latter and petitioner did not know that these unrelated allegations were on the table until he read respondent Foley's May 16, 1995 memorandum to Bender in discovery.

As due process requires "notice of the charges" against the employee (*Loudermill*, 470 U.S. at 546), this Court should reject respondents' attempt to wriggle out of its failure to properly accord petitioner a chance to reply to charges that he

was a violent man, which charges predicated his punishment and sanctions.

C. THE GRIEVANCE PROCEDURE DID NOT PROVIDE PETITIONER SUFFICIENT PROCESS

While petitioner's sanctions letter hints that the university relied on allegations in addition to Maher's complaint, respondent Foley's contemporaneous memorandum to Bender clearly establishes his intention to punish petitioner for allegations to which he never had an opportunity to respond. Any post-deprivation hearing would have required petitioner to address *every* reason for the sanctions, not just the alleged sexual harassment. However, petitioner did not see respondent Foley's memorandum to Bender until discovery and, *a fortiori*, could not have used it during any post-deprivation process.

Petitioner's ignorance about the substance of respondent Foley's other reasons for sanctioning him undercut the post-deprivation process since he could not have properly addressed the myriad of reasons underlying his punishment. As respondents have not indicated when, if at all, they planned to notify petitioner of the other reasons for the sanctions, they cannot now assert that he failed to avail himself of post-deprivation remedies.

In any event, the CBA grievance procedure did not accord petitioner adequate post-deprivation process since (1) category two grievances, like petitioner's, are subject to advisory, not binding, arbitration under the CBA and (2) there is no requirement that a bargaining unit member exhaust the grievance mechanism if, like petitioner, he has a category two grievance, like imposition of unjust discipline.

Article IX, F.6 of the CBA states:

> Exception as to Category Two Grievances: If the AAUP does not timely invoke Step Two in accordance with Section E.1. above, and the AAUP and/or the grievant commences a court proceeding pertaining to the grievance within 45 days of the last

> date upon which the AAUP could have timely invoked Step Two, the defense of exhaustion of remedies or exclusively of the grievance procedure will not be available to the University in such court proceeding. (Ja161).

Under the CBA, petitioner had at least 125 working days from the date his grievance arose to proceed in federal court. This follows from the time frames established in the CBA: the AAUP has 30 working days to file a Step One grievance; the grievant then has 10 working days to request a meeting with the University Vice President or Assistant Treasurer who has 10 working days to convene the meeting. The Step One provision does not set a date by which the university officer must make a decision on the grievance, but, thereafter, the AAUP has 30 days if dissatisfied to file a Step Two appeal in a Category Two case.

Section F.6. provides the grievant 45 days from the last date the AAUP could have filed a Step Two appeal (for arbitration) to proceed into federal court and avoid any university contention that he failed to exhaust administrative remedies. As petitioner filed this case on September 23, 1994, within 125 working days from notice of the adverse action against him (May 16, 1994), he properly exercised his rights under the CBA and respondents cannot persuasively assert that he did not avail himself of post-deprivation remedies.

CONCLUSION

This Honorable Court should grant the instant petition for certiorari.

Dated: October 31, 1997
Goshen, New York

Respectfully submitted,

JOAN E. GOLDBERG
Counsel of Record
P.O. Box 496
One Railroad Avenue
Goshen, New York 10924
(914) 294-3222

MICHAEL H. SUSSMAN
STEPHEN BERGSTEIN
SUSSMAN, BERGSTEIN
& WOTORSON
25 Main Street
Goshen, New York 10924
(914) 294-3991